Supreme Court, U.S.
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85-839

No.____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term 1985

DAMILO COMELIO LACHICA,

Petitioner

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

CHUNG NAN KIM, Esq.
1255 Post Street, Suite 850
San Francisco, CA 94109
(415) 771-7868

Attorney for Petitioner

QUESTION PRESENTED

Whether immigration judge abused discretion by denying petitioner's request for a continuance to have a full hearing on his application for voluntary departure under Section 244(e) of the Immigration and Nationality Act, 8 U.S.C.§ 1254(e), and denied him voluntary departure in lieu of deportation.

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IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1985
DANILO COMELIO LCAHICA,
Petitioner
vs.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DANILO COMELIO LCAHICA, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in said court on September 25, 1985, affirming the decision of the Board of Immigration Appeals finding petitioner deportable under Section 241(a)(2) of the Immigration and Nationality Act.

OPINION BELOW

A Memorandum decision rendered on September 25, 1985 by the United States Court of Appeals for the Ninth Circuit is

reproduced in Appendix A to this Petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 25, 1985. Petition for rehearing was denied on October 28, 1985. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

Constitution of the United States, Amendment VI:

> "...the accused shall enjoy the right ... to be confronted with the witnesses against him...."

8 Code of Federal Regulations 242.16(a):

> "...he (the alien) will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government."

Immigration and Nationality Act, Section 244 (e), 8 U.S.C. §1254(3).

> "The Attorney General may, in his discretion, permit any alien under deportation proceedings ... to depart voluntarily from the United States

> at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure...."

STATEMENT OF THE CASE

In a decision dated July 1, 1983, the immigration judge found the petitioner, a native and citizen of the Philippines, deportable, denied the petitioner's request for a continuance to have a full hearing on his application for voluntary departure under section 244(e) of the Immigration and Nationality Act, 8 U.S.C. § 1254 (e), and denied him voluntary departure in lieu of deportation.

At the deportation hearing, deportability was conceded that under Section 241 (a) (2) of the Immigration and Nationality Act, after admission as a nonimmigrant visitor, petitioner had remained in the United States for a longer time than permitted. Petitioner than applied for

the discretionary relief of voluntary departure. The government objected to granting of voluntary departure on discretionary grounds by charging that: (1) petitioner perpetrated a marriage fraud and (2) petitioner attempted to obtain a U. S. passport through a false claims of U. S. citizenship. The government's evidence consisted of sworn statement by petitioner's former wife and Immigration and Naturalization Service report of investigation. Petitioner challenged the evidence as insufficient to establish the government's allegations and made the request for full hearing to afford petitioner an opportunity to cross-examine government's witnesses. The request was denied, and an order for deportation was entered.

The petitioner appealed the order of deportation to the Board of Immigration Appeals which, on January 10, 1985, affirmed the order of immigration judge

and dismissed the appeal.

Petitioner sought judicial review before the United States Court of Appeal for the Ninth Circuit pursuant to Section 106(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1105(a). The Appeals Court denied the petition for review on September 25, 1985. Petitioner filed a petition for rehearing, which was denied on October 29, 1985.

ARGUMENT FOR ALLOWANCE OF WRIT

Immigration judge's denial of petitioner's request for voluntary departure and motion for continuance for full hearing is an abuse of discretion.

At the deportation hearing, the alien has a right to cross-examine witnesses presented by the Government. See Da Silva Pereira v. Murff, 169 F. Supp. 81 (S.D. N. Y. 1958. 8 C. F. R. 242.16(a).

In Diric v. INS, the court pointed out:

> "He (the trial attorney) should have called witnesses to testify rather than merely ask petitioner if certain statements in their letters were true. Such shortcutting may deny a petitioner the opportunity to confront and cross-exmaine these witnesses and is therefore improper." Diric v. INS, 400 F. 2d 658 (9th Cir. 1968).

In the instant proceedings before the court, the trial attorney had not called witnesses to testify, but simply presented certain statements and documents. When the evidence was introduced, petitioner objected that such evidence was insufficient, and requested to cross-examine the governm-ment's witnesses.

The Appeals Court held that it is unnecessary to reach the issue of insufficiency of government's introduction of hearsay evidence, because petitioner cannot prevail in any case as he failed to sustain his burden of proving eligibility for voluntary departure, i.e. petitioner failed to establish that he had been of

good moral character for five years prior to the application of relief.

The process of determining whether alien is entitled to voluntary departure consists of two steps: (1) determination of eligibility to seek a discretionary relief; (2) discretionary exercise of such a relief. In practice, it is not uncommon for administrative officials to assume eligibility and to deny relief in the exercise of discretion, and the U. S. Supreme Court upheld such a practice of assuming eligigility without actually determining it.

> "Here, it is conceded that respondent's application would have been properly denied whether or not she satisfied the statutory eligibility requirements. In these circumstances, absent an express statutory requirement, we see no reason to depart from the general rule and require immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility." INS v Bagasbad, 429 U. S. 14, 97, S. Ct. 200, 50 L. Ed. 2d 190 (1976).

In the instant case, eligibility issue was never raised during the hearing, but

immigration judge assumed petitioner's eligibility at the beginning of hearing, and the entire proceeding on the question of voluntary departure was on the discretionary grounds, as is common in many deportation hearings. To say that immigration judge's decision was not based upon Government's improper evidence is a distortion of the facts, as without the Government's evidence, immigration judge would have granted the voluntary departure.

CONCLUSION

Immigration judge's denial of petitioner's request for voluntary departure and motion for continuance of hearing were based on improper hearsay evidence. The Appeals Court disregarded the issue of improper evidence, holding that immigration judge's decision was not based on such improper evidence.

In view of the foregoing argument,

it is respectfully submitted that this petition be granted.

CHUNG NAN KIM
Attorney for Petitioner

APPENDIX A

Memorandum Opinion of United States Court of Appeals for the Ninth Circuit

DANILO COMELIO LACHICA, Petitioner, vs. IMMIGRATION AND NATURALIZATION SERVICE, Respondent. No. 85-7055. Petition for Review of an Order of the Board of Immigration Appeals. Argued and Sumbitted September 10, 1985, San Francisco, California. Before: WALLACE, HUG, and SCHROEDER, Circuit Judges.

Lachica seeks review of the Board of Immigration Appeals' (BIA) dismissal of his appeals from the denial of his application for voluntary departure. We have jurisdiction under 8 U.S.C.§ 1105a.

Whether an admittedly deportable alien may be permitted to depart voluntarily is a matter within the discretion of the Attorney General or his delegate. Cuevas-Ortega v. INS, 588 F. 2d 1274, 1278 (9th Cir. 1979). On review, our examination is limited to determining whether discretion was exercised in an arbitrary or capricious manner. Id.

We disagree with the Immigration and Naturalization Service's (INS) contention that the issue on review is moot because Lachica has already remained in the United States beyond the six months he requested for voluntary departure. That is not dispositive, since the granting of voluntary departure status itself may be an important benefit to one who is otherwise deportable. Permission to depart voluntarily avoids the stigma of deportation, enables the applicant to select his own destination and, most importantly, facilitates the possibility of return to the United States. Tzantarmas v. United States, 402 F. 2d 163, 165 n.1 (9th Cir. 1968), cert. denied, 394 U.S.966 (1969). Thus, Lachica's request for review of the BIA's dismissal does not constitute a moot question.

Lachica argues that the INS's introduction of hearsay evidence to show his

bad moral moral character was insufficient to deny his application for voluntary departure. It is unnecessary to reach this issue. As the BIA held, even without the use of the INS's documentary evidence, Lachica cannot prevail because he failed to sustain his burden of proving eligibility for voluntary departure. See 8 C.F.R. §242.17(e) (1985).

One of the statutory requirements for voluntary departure, which Lachica bears the burden of establishing, is proof of good moral character for at lease five years prior to application. Cuevas-Ortega, 588 F. 2d at 1278; Trias-Hernandes v. INS, 528 F. 2d 366, 370 (9th Cir. 1975). Lachica presented no such evidence. Despite being reminded by the immigration judge regarding his burden of proof, Lachica failed to testify or otherwise introduce affirmative evidence of good moral character. In the absence of such affirmative evidence, it was not an abuse of discretion to deny

Lachica the status of voluntary departure.

Lachica also contends that his due process rights were violated because the immigration judge denied his motion for a continuance of the hearing. Lachica requested the continuance in order to have the opportunito to cross-examine those individuals responsible for the adverse documentary evidence presented by the government. As the holding by the BIA which we sustain did not rely on that evidence, we need not reach the issue.

PETITION DENIED.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 21.